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Nos. 91-142 and 91-349

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

TIDEWATER MARINE SERVICE, INC., *etc., et al.*,
and
PACIFIC MERCHANT SHIPPING ASSOCIATION, *etc., et al.*,
Petitioners,

vs.

LLOYD W. AUBRY, JR., STATE OF CALIFORNIA LABOR COMMISSIONER, AND DIVISION OF LABOR STANDARDS ENFORCEMENT, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents are the officials mandated by California law to enforce all of the labor laws of the State of California the enforcement of which is not specifically vested in any other officer, board or commission. (California Labor Code §95) Among other labor laws, Respondents enforce the Industrial Welfare Commission Orders regulating the maximum working hours of, among others, California residents employed on vessels either (1) stationed on the high seas surrounding oil rigs off the California coast, or (2) engaged in "voyages" between one port in California and the oil rigs, but *which are not engaged in foreign, intercoastal or coastwise voyages.*

The questions for review are:

1. Does the express exemption of seamen from the maximum hour provisions of the Fair Labor Standards Act found at Section 13(b)(6) have the effect of preempting the actions of the Respondents in this regard?

2. Does the State of California's enforcement of its law regulating the maximum hours of the above-described workers interfere with the need for uniformity in the application of admiralty law?

3. Does the fact that the workers' predominant worksite is exclusively located on the high seas directly off the coast of California preclude the State from regulating the maximum hours of workers whose only contact is with the State of California?

LIST OF PARTIES

The Petitioners in this Court (No. 91-142) are Tidewater Marine Service, Inc., and Western Boat Operators, Inc. who were intervenor plaintiffs-appellees in the trial and appellate proceedings.

Additionally, Petitioners in this Court (No. 91-349) are Pacific Merchant Shipping Association, Clean Seas, American Institute of Merchant Shipping, Offshore Marine Service Association, and Western Oil & Gas Association who were plaintiffs-appellees in the trial and appellate proceedings and have filed a separate but related petition pursuant to Rule 19.4.

The Respondent in this Court to both petitions is Lloyd W. Aubry, Jr., Labor Commissioner, Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, who was the defendant-appellant in the trial and appellate proceedings below. Respondent's opposition herein is to both of the above-referred petitions.

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STATEMENT OF THE CASE

I.

BACKGROUND

Since the landmark case of *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) there has been little question that the police power of the individual states encompasses the regulation of the wages, hours and working conditions of workers under its jurisdiction. Congress recognized this power when enacting the Fair Labor Standards Act and specifically provided that "No provision of this chapter or any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter..." 29 U.S.C. §218(a) The California Industrial Welfare Commission (hereinafter "IWC") has adopted maximum workweeks[1] which are lower than those established by the Fair Labor Standards Act. Any work performed in excess of eight hours

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[1]There are sixteen separate Industrial Welfare Commission Orders. The Orders are found at Title 8, California Code of Regulations, §§ 11000 et seq. Twelve of the Orders regulate wages, hours and working conditions in specific industries (i.e., manufacturing, public housekeeping, transportation, etc.). Three IWC Orders cover occupations and there is one general minimum wage order applicable to all California employees. Of the "occupation orders" Order 14-80 covers agricultural occupations; Order 15-86 regulates the private household occupations, and Order 4-80 (now superseded by Order 4-89) applies to "all persons employed in professional, technical, clerical, mechanical, and similar occupations...unless such occupation is performed in an industry covered by an industry order of this Commission..." Simply put, Order 4 covers all workers not specifically exempted from coverage who are not covered by another order.

in any one workday or forty hours in any one workweek must be compensated at appropriate premium levels[2].

The Division of Labor Standards Enforcement (DLSE) is the California agency mandated to interpret and enforce the provisions of the Industrial Welfare Commission Orders.[3] Historically, the DLSE has enforced the applicable provisions of the IWC Orders in the so-called maritime industries when the workers' sole contact is with the State of California. This same enforcement policy is utilized with respect to workers employed in the maritime industry when, for example, the workers are engaged in transportation on water within the jurisdiction of the State of California or engaged in commercial or recreational fishing[4]. The IWC Orders are also applied to vessels engaged in transportation on water within the jurisdiction of the State of California[5].

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[2]Most of the Orders required time and one-half the regular rate for hours in excess of eight and double the regular rate for hours in excess of twelve.

[3]Labor Code §§ 1195, 1195.5, 1198.3, 1198.4. See also, *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239; *Aguilar v. Association of Retarded Citizens* (1991) ___ Cal.App.3d ___, 285 Cal.Rptr. 515.

[4]In 1986 the California Legislature amended the Labor Code to provide that henceforth workers employed on licensed fishing vessels would not be subject to the provisions of the IWC Orders. (Calif. Labor Code §1182.3) The stated intent of the Legislature was to "make California law consistent with federal law with regard to minimum wages and maximum hours in the *commercial fishing industry.*" (Emphasis added)

[5]IWC Order 9-80 (now superseded by Order 9-90) defines the "Transportation Industry" as "...any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway air, or *water*, and all operations and services in connection therewith..." (Emphasis added)

Congress, in adopting the Fair Labor Standards Act chose to exempt "seamen" from both the minimum wage and overtime provisions[6], and in 1961, amended the Act to provide minimum wage protection to seamen; but Congress refused to extend the protections of overtime to these workers.[7] As evidenced by the minutes of the Joint Congressional Hearings, the reasons for these exemptions are manifold and involve the unique nature of the transportation industry in general as well as concerns in the maritime industry.

Originally, representatives of the principal labor organizations representing both seamen and other transportation workers testified orally and in writing that the peculiar needs of the *transportation* industry and the fact that the industry was already under special governmental regulation made it unwise to bring transportation workers within the scope of the proposed legislation[8]. Based on this testimony Congress exempted all seamen and certain other transportation workers from the protections of the Fair Labor Standards Act. The rationale for seeking the exemption put forward by the National Maritime Union was that without that exemption the "proposed Labor Standards Board" would have "jurisdiction over those classes of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the

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[6]52 Stat. 1067 §13(a)(3), c. 676 (1938).

[7]75 Stat. 71, §9 and §10 (1961)

[8]Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 545, 546, 547, 549, 1216, 1217.

jurisdiction of the government machinery set up to handle these problems."[9]

As the Circuit Court has noted:

> "The legislative history of the FLSA does show that Congress considered the special circumstances of maritime and other types of labor when it exempted seamen and other employees from the FLSA's overtime and minimum wage provisions. Federal Amicus argues, however, and we agree, that in exempting seamen from coverage under the 1938 act's overtime and minimum wage provisions, Congress intended to prevent overlapping regulation of wage and hour conditions of seamen by differing *federal* agencies." (Emphasis added) (Appendix to TIDEWATER's Petition For Writ Of Certiorari [hereinafter "Appendix"], at page A-17)[10]

However, there is nothing in the legislative record of the Fair Labor Standards Act which could lead to the conclusion that Congress intended to deprive the *states* of the right to

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[9]Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 544-549. Under the original proposal, all wage and hour claims arising under the FLSA were to be handled by a new Labor Standards Board. At the time Congress was considering the proposed legislation, however, maritime employees' wage and hour claims were handled by the Maritime Commission under the Merchant Marine Act of 1936. It was a concern that organized labor's gains already achieved by the maritime workers before the Maritime Commission could be jeopardized which led labor leaders to seek the exemption.

[10]For purposes of convenience and consistency, all future references to the "Appendix" refers to the Appendix to TIDEWATER'S Petition for Writ of Certiorari.

regulate the maximum workweek of seamen or any other classification of workers.

Further, under the facts in this case, neither the District Court nor the Ninth Circuit could find any conflict between federal admiralty law or regulations and the California Industrial Welfare Commission Orders. In addition, there is no showing that the exercise by the State of California of its inherent police power to regulate the wages of its workers employed in the same circumstances as those of the workers involved in this matter requires a delegation by Congress of that body's power to "alter, amend or revise the maritime law by statutes of general application."

II.

THE FACTS

This case originally arose as a result of complaints filed with the office of the California State Labor Commissioner, chief of the Division of Labor Standards Enforcement ("DLSE"), by workers[11] employed on board the Vessels Mr. Clean II and Mr. Clean III alleging failure of their employer, CLEAN SEAS[12], to pay premium wages for hours in excess of eight in a workday or forty in a workweek.

The two CLEAN SEAS vessels' duties involve control and clean up of oil spills and other environmentally

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[11]Twelve "Clean Seas" employees, all found by the District Court to be residents of the State of California, are involved.

[12]CLEAN SEAS is an unincorporated, cooperative association, formed by several major oil companies to contain and clean up marine spills off the California coast. (Appendix at A-5)

hazardous discharges in the Santa Barbara Channel off the California coast. *Mr. Clean II* is a 138-foot vessel moored in Port San Luis Harbor, California, where is remains about 90 percent of the time. *Mr Clean III* is a 181-foot vessel permanently stationed on the high seas off the California coast. *Mr. Clean III* conducts containment and clean up operations around four oil drilling and production platforms over the Pedernales and Arguello oil fields, from four to ten nautical miles off the California coast. When not on active duty, *Mr. Clean III* is tied to a buoy approximately seven miles off the California coast.[13]

Prior to the scheduling of any hearing on the merits of the complaints, CLEAN SEAS challenged the jurisdiction of the Labor Commissioner in letters directed to DLSE Headquarters in San Francisco. The jurisdictional challenge was denied by the DLSE. After the denial of the jurisdictional challenge, hearings were held pursuant to the provisions of the California Labor Code by a hearing officer in the DLSE offices in Santa Barbara, California.

At the hearings on the merits of the complaints, the Hearing Officer obviously determined that the CLEAN SEAS vessels were not engaged in any industry covered by an "industry order" promulgated by the Industrial Welfare Commission, but were engaged in occupations covered by IWC Order 4-80 (technical, mechanical and similar occu-

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[13]Notwithstanding the unsupported statement of Petitioner Pacific Merchant Shipping Association (hereinafter "PMSA"), there is nothing in the record to indicate that any of the Clean Seas vessels involved here ever left their stations. Both the District Court and the Ninth Circuit found, as a matter of fact, that these vessels were stationed directly off the coast of California and operated exclusively in waters directly off the California coast.

pations).[14] The hearing officer found that the workers were required to work twelve hours per day, seven days per week, on a rotating schedule which provided for seven days aboard the vessels and seven days ashore. The hearing officer found that the workers were entitled to recover overtime wages from their employer, CLEAN SEAS.

CLEAN SEAS filed timely notices of appeal of the orders, decisions and awards of the Labor Commissioner to the appropriate California Superior Court as provided by state law. These *de novo* appeals are currently pending in the state superior court. CLEAN SEAS joined by Pacific Merchant Shipping Association and the other maritime trade associations, (hereinafter collectively referred to as "PMSA") also filed a complaint in the Federal District Court for the Central District of California seeking declaratory and injunctive relief that California's labor laws are preempted by

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[14]At footnote 12 of the Petition for Certiorari filed by Pacific Merchant Shipping the Petitioner concludes that because of the differences between the Fair Labor Standards Act and the California Industrial Welfare Commission Orders the "non-exempt maritime employee working the *same* schedule...for the *same* employer on the *same* vessel would be entitled to $1,052 *more per week* under California law than he would under federal law." What Petitioner fails to point out is that because of the differences between the Industrial Welfare Commission Orders and the FLSA this same result would apply to a variety of workers. As an example, the FLSA treats those employed on small newspapers (29 U.S.C. 213(a)(8)); mechanics, drivers and helpers (29 U.S.C. §213(B)(1)), and salesmen, partsmen and mechanics engaged in selling or servicing automobiles, trucks, or farm implements (29 U.S.C. 213(b)(10)(A)) differently from the way those same workers are treated under the California law. The differences are not a result of contrasting the situation of "land-based" and maritime employees; the difference in the treatment of these workers under California law as opposed to the treatment they would receive under the FLSA is the result of differing interpretations as to the needs of the workers made by the legislative bodies involved.

federal admiralty law and the United States Constitution insofar as they purport to regulate the wages, hours and working conditions of maritime employees.

Subsequent to the complaints filed with the Labor Commissioner by the CLEAN SEAS workers, an employee (Frank Kleman) of Tidewater Marine Service, Inc. ("TIDEWATER") filed a complaint with the Labor Commissioner alleging failure by TIDEWATER to pay overtime wages. Typically, TIDEWATER employees, like those of CLEAN SEAS, work 7-day hitches of 12-hour days alternating with 7-day rest periods onshore. Upon receipt of notification of the filing of the complaint by Kleman, TIDEWATER intervened in support of PMSA and CLEAN SEAS in the federal action.

There has been no administrative hearing held in regards to the complaint of Mr. Kleman or any other employee of TIDEWATER and no determination has been made regarding which, if any, of the Industrial Welfare Commission Orders would cover Mr. Kleman's employment.[15]

The Labor Commissioner has stayed all similar DLSE administrative proceedings pending the outcome of this action.

In summary, the undisputed facts clearly establish that the workers involved in this case were California residents employed on vessels moored at varying distances directly off the California coast or operating from California ports exclusively in areas directly off the California coast. These vessels have no contact with any other of the several states or with any foreign nation.

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[15]See applicability of IWC Orders to employers engaged in the "Transportation Industry" at footnote 5, *supra*.

III.

THE PROCEEDINGS BELOW

This action was originally filed by PMSA, Clean Seas and the several maritime trade associations after the California state Labor Commissioner had determined, after administrative hearings, that twelve workers employed aboard its vessels operating in the Santa Barbara Channel were entitled to recover overtime compensation pursuant to California law for hours in excess of eight in any one day or forty in any one week. This Federal action was filed at or near the time of the filing of the state court appeals of the Labor Commissioner's rulings. TIDEWATER was permitted to intervene in the action in June, 1988.

Following cross-motions for summary judgment, the District Court granted summary judgment in favor of Plaintiffs on March 1, 1989. The District Court held that inasmuch as Congress may not delegate its maritime jurisdiction, the savings clause of the Fair Labor Standards Act (29 U.S.C. 18(a)) does not apply to maritime employees. As a result, the District court held, the state of California could not exercise its police power in this area.

The District Court held that while "[m]aritime statutes simply do not purport to govern the overtime wages of employees such as those in this action," since Congress had exempted seamen from the overtime requirements under the FLSA, "common sense" dictated that it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause. (Appendix at A-64)

The Labor Commissioner appealed the District Court's ruling and, joined by The United States of America as *amicus curiae,* argued that there exists no conflict between

the FLSA and the California overtime provisions and the award of overtime pay to the workers is neither inconsistent with, nor precluded by, federal admiralty law.

The Ninth Circuit reversed the District Court in an opinion filed November 13, 1990, holding that:

> "In contrast to the [State of] California's strong interests, Federal interests in precluding enforcement of California's overtime provisions in this case are relatively weak. There is no indication that Congress, in enacting the FLSA's savings clause, intended to preempt states from according more generous protection to maritime employees on the high seas off a state's coastal waters. Further, the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA. (Appendix, p. A-33) (Emphasis in original)

The Circuit Court went on to note that inasmuch as the workers involved are California residents who work on vessels that operate exclusively off the California coast, application of the state's overtime law will not disrupt international or interstate commerce. On one very important issue the Circuit Court reached the same conclusion as that reached by the District Court: *There is no conflict between the California overtime law and federal admiralty law.*

In dissent, District Judge William P. Copple (sitting by designation) concluded that since admiralty law has no requirement that a maritime worker receive overtime pay, absent an express clause in the employment agreement maritime workers are not entitled to recover overtime wages

pursuant to statute[16]. (Appendix, pages A-40—A-41) Additionally, Judge Copple agreed with the District Court's conclusion that since "in light of the obvious conflict between California's overtime compensation provision and the FLSA, the FLSA preempts California's provision." (Appendix, page A-44)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

EXERCISE OF THE STATE'S POLICE POWER TO REGULATE THE OVERTIME COMPENSATION OF THE WORKERS INVOLVED IN THIS CASE IS NOT PREEMPTED BY ADMIRALTY LAW

A. The Ninth Circuit's Decision Expressly Limits Its Application To Workers Who Are California Residents Not Engaged In Foreign, Intercoastal, Or Coastwise Voyages Whose Predominate Work-site Is In the Territorial Waters Or On The High Seas Off The California Coast.

In the Ninth Circuit's discussion of the jurisdiction and scope of relief, the court reviewed at some length the District Court's opinion. (Appendix at pages A-8—A-11) The Ninth Circuit determined that despite the fact that PMSA and TIDEWATER sought a ruling which would cover all employees of its members with respect to a broad range of

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[16]This conclusion completely overlooks the fact that not all *maritime* workers are exempt from the overtime requirements of the FLSA. Only "seamen" are expressly exempt. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986).

California Labor Code provisions, the District Court had limited that relief to cover only:

> "...application of California's overtime pay laws to (1) FLSA-exempt seamen working within the territorial zone or on the high seas; and (2) maritime employees working primarily on vessels on the high seas that are not engaged in foreign, intercoastal, or coastwise voyages."

The Circuit Court explained that the District Court, had applied the constitutional rule set out in *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) which requires that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining injury as a result of the statute's operation or enforcement" in denying the request of PMSA and TIDEWATER to increase the scope of the relief.

In view of Petitioners unrelenting attempts to expand the scope of relief to be decided, the Circuit Court observed in Footnote 5, (Appendix, at pages A-9—A-10) that "the overall thrust of the district court's analysis strongly suggests that the discussion was limited to employees like those who brought claims in the underlying state administrative action" as described above. Moreover, the court expressly limited the scope of its opinion to those employees described and discussed by the district court.

Despite the limitations placed on the jurisdiction of the Labor Commissioner by both the District Court and the Circuit Court, neither PMSA nor TIDEWATER appealed the District Court's limitations which the Circuit Court adopted. Yet, both PMSA and TIDEWATER now argue that the ramifications of the ruling of the Ninth Circuit containing the same limitations as the ruling of the District Court, will

impact on a wide range of employments within admiralty jurisdiction.

The Ninth Circuit's discussion of the scope of relief was significant to its determination that, within the stated limits, the declaratory relief met the Constitutional case or controversy requirement. Thus, as stated and painstakingly—yet expressly—qualified by both the District Court and the Ninth Circuit, the *factual* scenario upon which the legal analysis necessary to determine the jurisdiction of the State of California must be based is limited to the circumstances surrounding the specific class of workers described by the two lower courts.[17]

Nonetheless, both Petitioners in their briefs before this Honorable Court attempt to paint a picture of economic doom, confusion and uncertainty, and impermissible interference with the uniformity of admiralty law brought about as a result of the State of California applying its law. The Petitioners *anticipate* that California will apply its law to workers who are simply "based" in California or are "residents" of the state without regard to whether the workers are employed *exclusively* in waters off the California coast on vessels which are not engaged in foreign, intercoastal, or coastwise voyages. Simply *anticipating* a problem does not create a case or controversy and such *anticipation*, absent a

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[17]Obviously, the statement of a Deputy Labor Commissioner (a non-lawyer referred to by Petitioner PMSA as "Respondent's designated policy expert", see Petition of PMSA, fn, 4, pages 5—6) that he "thinks" the Labor Commissioner has jurisdiction over non-California residents whose work situs is a vessel located outside the State of California is not entitled to a great deal of weight in view of the limits placed on the jurisdiction by both the District and Circuit Courts in the circumstances at issue here. Such would be the case even if those statements accurately depicted the position of the Labor Commissioner.

realistic danger, cannot be used as a vehicle to grant declaratory or injunctive relief. *Babbit v. United Farm Workers Nat'l Union, supra,* 442 U.S. 289 at 298. By expanding the facts Petitioners hope to elicit an advisory opinion from this Honorable Court.

In view of the fact that the limitations on the jurisdiction of the Labor Commissioner had been determined by the District Court and no appeal of that limitation was taken by the Petitioners, it is inappropriate for the issues to be raised in this court. Petitioners' "anticipated problems" are, thus, better left for the day, if *or* when it arrives, that such factual scenarios as those painted by the Petitioners are, in fact, at issue in a case. At that time the issues Petitioners raise could be presented to the federal courts to be determined within the case or controversy requirements of the United States Constitution.

B. The Ninth Circuit's Preemption Analysis Does Not Conflict With Principles Of Federal Admiralty Jurisdiction.

1. The Preemption Standard

The Ninth Circuit, in addressing the preemption question stated "we start with the assumption that the historic powers of the States were not to be superseded by [federal legislation] unless there was a clear and manifest purpose of Congress." [Citations]. (Appendix, A-11)

Petitioner Tidewater criticizes the Ninth Circuit's preemption analysis as "an unusually rigorous preemption standard" (TIDEWATER Petition, p. 12) and "completely foreign to maritime law and entirely at odds with the constitutional requirement for federal uniformity" (Id. p. 18). This contention, however, completely ignores the fact that the

same test was applied in *Ray v. Atlantic Richfield Co.* 435 U.S. 148, 156 (1978) as the standard for challenging a state's police powers under the doctrine of federal preemption in the admiralty area. As this Honorable Court said in *Askew v. American Waterways Operators, Inc.* 411 U.S. 325, 339 (1973): it is a long-established principle that "...a state, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs provided that the state action does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." (quoting Mr. Chief Justice Hughes in *Just v. Chambers* 312 U.S. 383 at 388 (1941))

2. The States Are Not Completely Precluded From Legislating On The "High Seas"

Justice Stewart (with whom Justice Rehnquist joined in dissent) responded to contentions of the petitioners in *Oil, Chemical & Atomic Workers, Etc. v. Mobil Oil*, 426 U.S. 407 (1976), that implementation of Texas' right-to-work law to employees employed on the high seas would constitute an intrusion into that "exclusive" federal enclave:

> "To refute the notion that the high seas are a species of federal enclave, it is sufficient to point out that the Court has found state legislation pre-empted *only* when the nature of the problem required the application of a uniform rule or when the state law unduly hampered maritime commerce.
>
> ...

> "The Court has never struck down a state law on the ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean "territory." 426 U.S. at 435-436

In summary, the exercise of a state's traditional police powers in the admiralty area is permissible absent a clear conflict with a Federal statute or when the state statute directly interferes with the necessary uniformity of admiralty law. Such standard gives due regard to the powers which are specifically reserved to the states under the 10th Amendment of the U.S. Constitution.

3. California's Overtime Requirement Does Not In Any Way Contravene An Act of Congress

Both the District Court and the Circuit Court determined that "Maritime statutes simply do not purport to govern the overtime wages of employees such as those in this action." (Appendix, page A-12)

The Circuit Court noted that while the Shipping Act (46 U.S.C. §§ 10301-10908) does govern some maritime employees' wages, hours and working conditions, those provisions do not apply to the employees involved in this appeal because the Shipping Act provisions only cover vessels engaged in foreign, intercoastal, or coastwise voyages. The workers involved in this case do not fall under any of the above categories of voyages. The vessels employing these workers were moored in port, stayed on the high seas surrounding the oil rigs or *voyaged* between one port and the oil rigs. (Appendix, pages A-5 and A-7)

While the District Court held that the FLSA preempted California overtime pay laws, the Circuit Court pointed out that Congress has never expressly prohibited states from

applying their overtime laws to seamen and neither PMSA nor TIDEWATER could point to anything in the legislative history of the FLSA to suggest that Congress intended to preclude application of state overtime provisions to seamen.

4. The Exemption Of Certain Categories Of Workers In The FLSA Does Not Evidence An Intent By Congress That The States Are Precluded From Covering Them

Petitioner TIDEWATER states that the Ninth Circuit ignores the concept of "negative preemption" as described in *Ray v. Atlantic Richfield Co.* 435 U.S. 151, 178 (1978), (TIDEWATER Petition, page 19) TIDEWATER contends that "Congress has expressly declared in Section 13(b)(6) of the FLSA that seamen should be exempt from...maximum hour and overtime standards." Thus, TIDEWATER concludes, the holding in *Ray v. Atlantic Richfield Co.* must apply here to preclude the state from enforcing its overtime regulations.

The concept of "negative preemption" was described in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926). There this Honorable Court initially restated the proposition that "the intention of Congress to exclude states from exerting their police power must be clearly manifest." *Napier, supra,* at 611. In addressing preemption, concluded Justice Brandeis, the question must be: "Does the legislation of Congress manifest the intention to occupy the entire field?" When this Court applied that test in *Ray v. Atlantic Richfield Co., supra*, it looked to the "statutory pattern" to determine the congressional intent. From the review conducted in *Ray* it was clear that Congress' intent in regard to the Tanker Law was that "it desired someone with an overview of all the

possible ramifications of the regulation of oil tankers to promulgate limitations on tanker size and that he should act only after balancing all of the competing interests."

Applying that same test to the facts in this case, however, leads to the inescapable conclusion that in view of the *express* intent of Congress set out in Section 18(a) of the Fair Labor Standards Act, Congress intended that the purpose of the FLSA was, as the Circuit Court described it, "to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." (Appendix, p. A-33) To reach any other conclusion would make a mockery of the savings clause.

The consequences of reaching a conclusion to the effect that Congress' exemption of seamen from the overtime requirements of the FLSA must lead to the inference that Congress has precluded the states from adopting overtime requirements which would cover seamen, would be illogical. Congress has exempted such categories of workers as those employed on small newspapers from even the minimum wage (29 U.S.C. 213(a)(8)). In addition, such diverse categories as announcers on radio and television stations located in small towns (29 U.S.C. 213(b)(9)); salesmen, partsmen and mechanics engaged in selling or servicing automobiles, trucks, or farm implements (29 U.S.C. 213(b)(10)(A)), and domestic servants (29 U.S.C. 213(b)(21)) have been exempted from the overtime requirements of the FLSA. There is no logic which would support the conclusion that because Congress has expressly exempted these workers the inference arises that the lawmakers also intended to preclude the states from requiring that those workers receive the state-mandated minimum wage or overtime premium. None of the above workers fall into categories which are heavily regulated by

federal law. There exists no federal law or regulations which cover such occupations as pressmen or printers on small newspapers, used car salesmen or partsmen in an auto dealership, or domestic servants. Yet, if the argument presented by Petitioners is to have any rationale these categories of workers, now exempt from either the minimum wage or overtime provisions of the FLSA, would also be exempt from the state minimum requirements.

The mere recitation of the logical consequences of Petitioners' argument, of course, signals the extreme tenuousness of the contention.

5. The "General Principles" Of Admiralty Law Cited By PMSA In Regard To "Overtime" Deal With The "Type" Of Work, Not The "Hours" Of Work

Petitioner PMSA maintains that under general maritime law, workers and their employers are free to determine pursuant to agreement, the wages, hours, and working conditions under which the workers will be employed. (PMSA Petition, page 11) There is, as Petitioner correctly points out, no "implied right to overtime". This same rule applies to all employment and is not unique to the admiralty area.

As with any law applied to employment, admiralty courts have recognized a right[18] to fair compensation for work performed. (PMSA Petition, page 6) But Petitioner over-

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[18]The admiralty courts have applied the Biblical admonition that the "laborer is worthy of his hire" to remedy outrageous situations where the "seaman" has been asked to perform duties outside of the contract of employment as evidenced by the shipping articles. *The Lackme*, 93 F. 230 at 232.

states the case when it concludes that the admiralty law recognizes an *absolute* right to fair compensation for "overtime" performed. The cases which are cited by PMSA in support of its statement do not refer to "overtime" in its classical sense[19], these courts have simply found that "when seamen are required or induced by the master to do extra work in handling cargo, in port, for the mere advantage of the owners or charterers, such extra work is outside of the terms of the contract contained in the shipping articles, and in all such cases the law recognizes the *scriptural* rule that the laborer is worthy of his hire." *The Lakme*, 93 F. 230 at 232 (D.Wash.1899). (Emphasis added)

The fair compensation for the "overtime" in each of the cases cited by Petitioners involved an interpretation of the contract of employment. Admiralty law confers no "absolute" right to recovery for overtime; the Courts have simply recognized that you can't hire seamen, pay them seamen's wages, and expect them to perform longshoremen's work in addition to their other duties. The cases cited by Petitioners do nothing more than confirm that well-established rule.

In fact, Admiralty law never addresses the question of whether a seaman is entitled to "overtime" for hours worked in excess of a standard number of hours. Yet, from the fact that there exists no right to "overtime" under admiralty law, Petitioners ask that the Court conclude that a statutory obligation to pay overtime can not arise because such a requirement would interfere with the uniform and harmonious system of national maritime law. But again, as with the other arguments raised by the Petitioners, they fail to

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[19]These cases limit generally the type of work the "seaman" is expected to perform; not the hours he is expected to toil as limited by both the FLSA and state law.

point to any authority which would support their theory that a state law affecting only workers employed *exclusively* off the coast of California with no contacts with any other state or nation, would impact on the uniform and harmonious system of maritime law.

6. The Effect Of *Jensen* And Its Progeny

Petitioners state in general terms that the standard applied by the Ninth Circuit was plainly inconsistent with *Southern Pacific v. Jensen*, 244 U.S. 205 (1917), and its progeny. (TIDEWATER Petition, page 17) But, as correctly quoted by Petitioner, the *Jensen* and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), cases discuss uniformity of maritime matters in terms of preserving "freedom of *navigation between the states and with foreign countries.*" See *Jensen*, 244 U.S. at 217. Thus, any direct application of *Jensen* to preclude, *ipso facto*, the exercise of the state's police power to regulate and protect workers whose only contact is with the State of California and who work exclusively off the California coast is severely misplaced.

The concern of this Court in the *Jensen* and *Knickerbocker* cases was the effect the state law could have on shippers whose vessels traveled not only from state to state but in interstate commerce as well. The law should not depend, where numerous jurisdictions are involved, upon the fortuitous location of the vessel at the time of an injury.

And, of course, while expressing the belief that *Jensen* has continuing force, the Circuit Court pointed out, "the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict*

with federal law or *interfere* with the *uniform working* of the maritime legal system."

Moreover, this Honorable Court has characterized the need for "uniformity" of maritime matters in the face of a state's exercise of its police powers by stating that "the Constitution presupposes a body of maritime law, that this law, as a matter of *interstate and international concern*, requires harmony in its administration ..." *Askew, supra*, 411 U.S. at 339, quoting *Just v. Chambers, supra*, 312 U.S. 383. Thus, at best, the federal uniformity argument is most compelling in interstate and foreign navigation and is obviously applicable in areas where Congress has specifically legislated; but certainly uniformity and harmony isn't *automatically* applicable in areas of otherwise local[20] concern where Congress has chosen not to act.

The cases cited by TIDEWATER in its Petition at page 22 do little to support Petitioner's contentions. In both *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919) and *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) this Court

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[20]As Prof. Currie explained in his treatise, *Federalism and the Admiralty: "The Devil's Own Mess,"* S.Ct. Rev. 158, at 171 (1960): "In ascertaining the interest of a state in the maritime application of its laws, profitable use can be made of enlightened theories of conflict of laws. The first step should be determination of the policies which are sought to be furthered by the state law in question...The second step should be an examination of such connecting factors as the place where the events giving rise to suit occurred, and the place of residence of the parties, in order to decide whether the matter has such an impact on the economy and affairs of a particular state as to give it a legitimate concern for the application of its laws. If the connection of the state with the matter in suit is such as to give it a legitimate concern for the advancement of the policy expressed in the law asserted to be applied, that state has an interest in the outcome of the litigation which is entitled to respect."

took pains to explain that the contracts at issue were intended to be performed all over the world.[21]

The Circuit Court distinguished the case of *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Co.*, 426 U.S. 407 (1976), from the facts in the instant case by noting that the workers involved in *Mobil* were residents of a number of different states and all were employed on vessels that voyaged regularly from Texas to New York or Rhode Island and back. The practical problems present in *Mobil* are not present in this case.

Also, of course, the final consideration in *Mobil* was whether "job situs" or "sufficient contacts" were the factors to be applied to determine whether the Texas right-to-work law should apply to the affected workers. This Court did not rely upon concepts of admiralty law in reaching its decision, concluding instead that "[i]t is therefore fully consistent with *national labor policy* [under the National Labor Relations Act] to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship and that no State's right-to-work laws can apply." (426 U.S. 420-421) (Emphasis added)

The case of *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), involved the question of whether a state law may be used to supplement the measure of recovery provided by the Death on the High Seas Act (DOHSA), a federal statute which impacts directly on the maritime industry.

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[21]For instance, in *Union Fish v. Erickson*, 248 U.S. 308, this Court noted that "[I]n entering into this contract the parties contemplated no services in California." The Court further noted that maritime law would always cover the conduct of "those who pursue commerce and put to sea." *Id.* at 313. The workers involved here are not engaged in commerce between the states or with foreign nations.

The Court in *Tallentire* considered "the legislative history ...the Congressional purposes underlying the Act, and the importance of uniformity of admiralty law" in reaching the conclusion that the language of the federal statute was intended only to serve as a jurisdictional savings clause.

It is respectfully submitted that no rational interpretation of the clear language of 29 U.S.C. §218(a) could lead to any other conclusion than that Congress intended to leave to the states the power to impose wage and hour requirements with minimum wages higher than those imposed by the Act and/or a maximum workweek shorter than that imposed by the Act. Congress has clearly spoken in this regard, and thus, *Tallentire* has absolutely no useful application to this case.

C. Petitioner's Proposed Construction Of The Savings Clause Contained At Section 18(a) of the Fair Labor Standards Act As An Unconstitutional Delegation of Maritime Powers To The States Is Flawed When Considered In Light Of The Legislative and Judicial History Of The Act

1. The FLSA Neither "Delegates" Any Legislative Authority To The States Nor Precludes The States From Applying Its Overtime Requirements To Its Residents.

Petitioner PMSA argues that the FLSA savings clause has been construed to permit state legislatures, in regulating land-based employment, to enact higher minimum wage rates and lower maximum workweek standards than those set forth

in the FLSA (PMSA Petition, p. 18)[22] Petitioner's argument then proceeds to conclude that since Congress may not delegate its legislative authority over maritime matters to the states under *Knickerbocker Ice Co. v. Stewart, supra,* allowing the States authority to regulate maritime employment pursuant to the FLSA savings clause would be an unconstitutional delegation of legislative authority over maritime employment to the states. In the *Knickerbocker Ice Co.* case this Court struck down a federal statute that granted states authority to apply state workers compensation laws to maritime employers as a delegation beyond the power of Congress.

The Petitioner's argument is severely flawed for two reasons: Initially, the question presented in *Knickerbocker* has not been reexamined by this Court and at least one highly regarded commentator states that *Knickerbocker* and the later case of *Washington v. W. C. Dawson* 264 U.S. 219 (1924) will be treated as aberrations.[23] Mr. Justice Black in response to a suggestion that a state law dealing with marine insurance would be invalid even where Congress has expressly or implied consented to state regulation noted that "[T]his contention is so lacking in merit that it need not be discussed." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321 fn. 29 (1955)

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[22]It must be noted that PMSA draws a heretofore unknown distinction between "land based" and "maritime" employment under the FLSA. Such a distinction is found nowhere in the FLSA. The FLSA merely exempts "seamen" from overtime coverage (29 U.S.C. §213(b)(6)). The term "seamen" has been specifically defined by the Secretary of Labor (29 C.F.R. §§ 783.31 et seq.) and clearly that definition does not exempt all other maritime workers.

[23]*Federalism and the Admiralty: "The Devil's Own Mess," supra,* S.Ct. Rev. 158, at 191 (1960)

In addition, the reasoning presumes that the State's power is necessarily coextensive with the FLSA contrary to the language stated in the FLSA's Savings Clause. By extension of their argument, Petitioner would maintain that, prior to the FLSA, California had absolutely no interest in protecting its local residents who worked locally off its shores on the high seas (and not otherwise engaging in maritime commerce via foreign, intercoastal, or coastwise voyages).

As previously discussed, however, the express exemption of seamen from coverage under the FLSA cannot logically be read to preclude exercise of the state's police powers in areas of historical and traditional coverage under state laws. Similarly, any examination of the FLSA, its savings clause, and the legislative history of the Act reveals that the savings provision does not "delegate" any congressional powers to the states. Nothing in the Legislative history of the FLSA even suggests or supports a Congressional intent to delegate any new or expanded powers to the States as was done and invalidated in *Knickerbocker*. Accordingly, The Ninth Circuit correctly found that:

> "California's actions in this case represent an exercise of traditional police powers firmly in place before Congress enacted the FLSA. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 393 (1937) ("In dealing with the relation of employer and employed, the [state] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. Thus, Congress did not 'delegate' authority to the states through section 218, but simply made clear its intent not to disturb the traditional

> exercise of the states' police powers with respect to wages and hours more generous than the federal standards. We cannot read Section 218 as a delegation, and, therefore, conclude that *Knickerbocker Ice* does not control this case." (Appendix at A-24—A25)[24]

Petitioner, thus, improperly suggests a novel but unfounded "but for" relationship between the federal FLSA and the state's inherent independent authority to exercise its traditional police powers over regulation of employment for its residents. This "but for" relationship theory disregards the express language contained in the FLSA's Savings Clause and significantly modifies historic principles of sovereignty between the federal and state governments. The Petitioner's argument is simply unsupported by reason or law.

2. The *Mobil Oil* and *Tallentire* Cases Do Not Require Preemption Of The State Law Under The FLSA Savings Clause In This Action

Notwithstanding the conceptual and logical infirmities of the basic argument to construe the Savings Clause as an unconstitutional delegation of maritime authority to California, Petitioner PMSA relies, as did the District Court, upon two more recent cases construing savings provisions contained in other federal laws regulating maritime matters on the high seas. (PMSA Petition, p. 20)

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[24]Petitioner's statement that the Circuit Court "agreed" with the District Court that a finding of preemption in this case would be automatic were it not for the FLSA's savings provision (PMSA Petition, p. 18) is not only an overstatement of the law; this conclusion is certainly at odds with the Circuit Court's finding as quoted above.

As discussed, *supra*, in *Oil, Chemical & Atomic Workers, International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407 (1976) and *Offshore Logistics, Inc, v. Tallentire*, 477 U.S. 207 (1986), this Court interpreted savings clauses in federal statutes (National Labor Relations Act and Death On the High Seas Act, respectively). However, as the Circuit Court properly observed, this Honorable Court construed the savings clauses by applying rules of statutory construction which considered the purposes of the enactments and the clear legislative history of the legislation. This review required restricted interpretations of the savings clauses in issue. This Court noted clear conflicts between the state and federal statutes in those cases, unlike the state and federal laws at issue in the instant case. Given the express language in FLSA Section 18(a) coupled with the announced purpose and the legislative history of the FLSA, a suggestion that it was the Congressional intent to preclude states from applying more protective overtime laws to local maritime workers working in the waters directly off the California coast who are not engaged in foreign, intercoastal, or coastwise maritime commerce is simply absurd.

CONCLUSION

The factual circumstances in this case limit the State's jurisdiction to enforce its overtime pay laws to workers who are California residents employed exclusively in waters off the California coast on vessels which are not engaged in foreign, intercoastal, or coastwise voyages. The workers have no contact with any state other than California and the work they perform has no direct impact on interstate commerce.

Given the factual scenario, there is no interference with the necessary uniformity in admiralty law. The states are not

incompetent to legislate over matters of historical local interest which happen to arise on the high seas; nor is there any federal law, express or implied, covering maritime workers such as those described here, with which the state overtime wage laws would conflict.

Congress did not "delegate" authority to the states through the Fair Labor Standards "savings clause", the states enjoyed a wide field of discretion in dealing with the relation of employer and employed before Congress adopted the FLSA. The language of section 218(a) of the FLSA simply clarified the intent of Congress not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standard.

Given the narrow factual situation, the application of the law to those facts by the Ninth Circuit, and the lack of any established conflict among the circuits, review by this Honorable Court is not necessary.

Respectfully submitted,

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